No. 98-822

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

FRIENDS OF THE EARTH, INCORPORATED, *et al.*,
Petitioners,
v.
LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,
Respondents.

ON WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, MISSOURI, ALABAMA, ARKANSAS, DELAWARE, ILLINOIS, MICHIGAN, MISSISSIPPI, NEW MEXICO, NEW YORK, NORTH CAROLINA, TENNESSEE, RHODE ISLAND, AND WASHINGTON IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a citizen suit brought under § 505 of the Clean Water Act, 33 U.S.C. § 1365, which sought injunctive and declaratory relief and civil penalties for ongoing violations of a National Pollutant Discharge Elimination System (NPDES) permit subsequently became moot, for lack of Article III redressability, where:

> (1) the NPDES permittee continued to violate its NPDES permit after suit was filed but came into compliance by the time of final judgment in the district court, and where,
>
> (2) the district court imposed civil penalties for the post-complaint NPDES permit violations, but denied injunctive relief because of the permittee's post-complaint compliance.

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INTEREST OF AMICI CURIAE

Amici States have a vital interest in the standing and mootness principles applied to citizen suits brought under § 505 of the Clean Water Act (CWA), 33 U.S.C. § 1365. Along with the federal government, they are the primary enforcers and administrators of the CWA. But the states have an equally significant role as "citizens," entitled to sue under CWA's citizen suit provision. *See* 33 U.S.C. §§ 1365(g), 1362(5); *Department of Energy v. Ohio*, 503 U.S. 607, 616 (1992). Under that provision, states bring citizen suits against those who pollute interstate waters. Even federal agencies are subject to citizen suits brought by states. *Department of Energy v. Ohio*, 503 U.S. at 616. In a variety of circumstances, citizen suits provide the states a better remedy than does an enforcement action. They are an important tool for states seeking to achieve environmental protection.

The states value that tool not just for their own use, but also for its use by others. Suits brought by private citizens fill the gap in CWA enforcement left by a lack of

governmental resources. Moreover, citizen suits provide a valuable avenue for public participation in environmental matters. A barometer for public sentiment and environmental concern, citizen suits help states focus their regulatory aims. And they provide an important opportunity for cooperation and communication among citizens, the regulated community, and government.

The Amici States' interest in preserving the effectiveness of citizen suits as a tool for protecting the environmental, health, and safety interests of their citizens will be directly affected by the decision in this case.

SUMMARY OF ARGUMENT

Standing and mootness are both aspects of justiciability. Though closely related, standing and mootness are applied using distinct principles. Standing evaluates a party's fitness to proceed at the outset of a case. Mootness, in contrast, examines the impact of subsequent events on a pending action. The impact on justiciability caused by subsequent events, including post-complaint compliance, should be evaluated on mootness rather than standing grounds. Because the issue before the court of appeals was created by post-complaint compliance, it was a question of mootness. But the court of appeals erroneously used a standing analysis to decide it.

Post-complaint compliance does not moot a citizen suit because the violator is "free to return to his old ways." Moreover, the ability of petitioner to demand and the district court's power to award civil penalties in a citizen suit is not dependant on whether injunctive relief is appropriate. Even if post-complaint compliance makes injunctive relief inappropriate, civil penalties can redress a citizen's injuries. Civil penalties provide an incentive for defendants to cure

violations and prevent further pollution. Deterrence benefits the affected waters by enhancing environmental protection and reducing pollution. Because the petitioners have a special interest in the affected waters, their injury is redressed by the enhanced environmental protection flowing from the deterrent effect generated by civil penalties. Consequently, civil penalties can redress the petitioners' injury.

I. THE COURT OF APPEALS MISTAKENLY APPLIED STANDING PRINCIPLES TO DECIDE A MOOTNESS QUESTION

The court of appeals did not question whether petitioners had standing. The court nonetheless found that dismissal was compelled by *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998) -- a standing decision. Yet it largely ignored *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987) -- which discussed mootness in circumstances like those here. The court of appeals thus misapplied the separate but related doctrines of standing and mootness. This Court should clarify the distinction and reiterate the heavy burden borne by a defendant that asserts mootness based on its own actions.

1. Standing and mootness are closely related, overlapping aspects of justiciability. *See Allen v. Wright*, 468 U.S. 737, 750 (1984) ("'All of the doctrines that cluster about Article III -- not only standing but mootness, ripeness, political question, and the like -- relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'", quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (D.C. Cir. 1983) (Bork, J., concurring)). *See also Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975)

("The standing question thus bears close affinity to questions of ripeness . . . and of mootness"); *Flast v. Cohen*, 392 U.S. 83, 99 (1968) ("standing 'serves, on occasion, as a shorthand expression for all the various elements of justiciability'", quoting Lewis, *Constitutional Rights and the Misuse of "Standing"*, 14 STAN. L. REV. 433, 453 (1962)). The constitutional dimension of mootness derives from the requirement that an Article III "case or controversy" persist throughout the litigation. *Deakins v. Monaghan*, 484 U.S. 193, 199 (1988); *Burke v. Barnes*, 479 U.S. 361, 363 (1987). The mootness doctrine requires that the parties maintain a "personal stake" in the outcome of the litigation, which, for the plaintiff, can be expressed in terms of the constitutional standing triad of actual injury, causation, and redressability. *Spencer v. Kemna*, 118 S.Ct. 978, 983 (1998). It is in this sense that mootness is said to be "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 (1997), quoting *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397 (1980).

2. Though standing and mootness are related analytically, they are applied using distinct principles. Standing focuses on the fitness of the *party* invoking the courts; mootness focuses on whether *events* have altered the appropriateness of judicial intervention. *Compare Flast*, 392 U.S. at 99, *with Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). The plaintiff bears the burden of establishing standing; the defendant who alleges that some event has made judicial intervention inappropriate bears the burden of establishing mootness. *Compare Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *with Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993).

The nature of the alleged mooting event -- whether it is due to the action of plaintiff, *Arizonans for Official English*, 520 U.S. at 67; *Deakins v. Monaghan*, 484 U.S. at 200 n. 4, or to the action of the defendant, *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953), or to some "independent" factor, *e.g.*, *Burke v. Barnes*, 479 U.S. at 363 (expiration of the bill by its own terms) -- significantly affects the burden borne by the defendant. When, as here, the alleged mooting event is the voluntary action of the defendant, "[t]he test for mootness . . is a stringent one": it must be "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phospate Export Assn.*, 393 U.S. 199, 203 (1969) (emphasis added). Otherwise, the defendant would be "free to return to his old ways" after dismissal for mootness. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953).[1]

3. Because of their analytical differences and distinct principles of application, mootness and standing are considered at different points in litigation. The Court generally has treated standing (like subject matter jurisdiction) as a threshold matter. The impact of subsequent events is then analyzed under the mootness doctrine rather than revisiting the initial standing decision. The plurality opinion in *Lujan* made this difference clear. It rejected the notion that subsequent events could supply a redressability element for standing that was lacking when the complaint was filed. *Lujan v. Defenders of Wildlife*, 504 U.S. at 570 n. 4. And it relied on subject matter jurisdiction -- which depends solely on the state of things at the time the action is filed -- as the

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1. The nature of the relief sought also affects the defendant's burden. When several forms of relief are sought, each must be examined for mootness independently. The mootness of equitable claims does not necessarily moot any damage claims. *Deakins*, 484 U.S. at 201; *Powell v. McCormack*, 395 U.S. 486, 497-500 (1969).

model for standing. *See* 504 U.S. at 569 n. 4. *See also Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. at 69 (Scalia, J., concurring). The many decisions holding that plaintiffs had standing when the complaint was filed but that their claims subsequently became moot, like *County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991), fit the model of assessing standing as a threshold matter and then evaluating the impact of subsequent events under the mootness doctrine.

4. The court of appeals decision ignored that model; it instead used a standing analysis to answer a mootness question. The court relied on *Steel Co. v. Citizens for a Better Environment* -- an initial standing case -- to analyze the mootness effect of events subsequent to the filing of the suit. The complainant in *Steel Co.* alleged only past violations of environmental information reporting requirements. 523 U.S. 83 at 1008. The Court held that the civil penalties sought would not redress plaintiff's injury from past reporting violations because: (1) civil penalties payable to the Treasury would not remedy the injury suffered, 523 U.S. 83 at 1018; and (2) injunctive relief would not remedy past violations, 523 U.S. 83 at 1019. Unfortunately for the plaintiff, while injunctive relief would remedy future violations by deterring them, plaintiff had not alleged either a continuing or a future violation. *See* 523 U.S. 83 at 1019. Here, in contrast, there is no question that petitioners had standing, and therefore satisfied redressability requirements, when they filed suit. Petitioners had standing based on their allegations of continuing violations of National Pollutant Discharge Elimination System (NPDES) discharge requirements, which, consistent with *Steel Co.*, could be redressed by injunctive relief and civil penalties.

The question here is not one of standing. It is whether subsequent voluntary compliance by respondent moots the

claims that petitioners had standing to raise at the time they filed the complaint. *Steel Co.* does not answer that question. But *Gwaltney of Smithfield. v. Chesapeake Bay Foundation,* does, albeit in dicta.

The complaint in *Gwaltney*, like the complaint here, included allegations that the NPDES discharger had violated and was continuing to violate NPDES requirements. *See* 484 U.S. at 54. The complaint sought declaratory and injunctive relief, and civil penalties. The discharger in *Gwaltney* claimed that it had ceased violating the law before plaintiffs filed suit, and that because the CWA citizen suit provision only authorized suits for ongoing, not wholly past violations, the courts lacked jurisdiction over the case. This Court held that a citizen could seek civil penalties only in conjunction with ongoing, not wholly past violations. 484 U.S. at 57.

Significantly, the discharger in *Gwaltney* also argued that if the allegations of ongoing violation became false after citizens filed suit, *i.e.*, if the discharger subsequently complied with NPDES requirements, then pursuit of the citizen suit would contravene the Article III "case or controversy" requirement. 484 U.S. at 66. The Court said if that occurred, *i.e.*, if there was post-complaint compliance, the matter would be analyzed under the mootness doctrine using the stringent standard for voluntary cessation of illegality by the defendant. *See* 484 U.S. at 66-67. *Supra* at 5.

Consequently, *Gwaltney* shows that if allegations of ongoing NPDES violations are sufficient to find standing when a complaint is filed, subsequent post-complaint compliance does not trigger reevaluation of the initial standing decision. Instead, *Gwaltney* calls for application of the mootness standard for voluntary cessation of illegality by the defendant. There is nothing in *Steel Co.* questioning this

mode of analysis in *Gwaltney*. In fact, in *Steel Co.* the Court treated *Gwaltney* as a case where "Article III standing was . . . found," 523 U.S. 83 at 1011 -- confirming that post-complaint compliance does not eliminate Article III standing that existed at the time suit is filed.[2]

5. Replacing mootness with standing concepts to analyze post-complaint compliance would eliminate the salutary flexibility in mootness doctrine. For example, the "personal stake" aspect of mootness is of no less constitutional dimension or origin than injury-in-fact or redressability for standing. Yet the Court has shown more flexibility in considering mootness than in considering standing. Thus it has recognized exceptions for mootness of disputes "capable of repetition, yet evading review," *Honig v. Doe*, 484 U.S. 305, 318 (1988), and for adjudication of class action issues despite the mootness of the class representatives' claims, *see United States Parole Commission v. Geraghty*, 445 U.S. 388. The Court has expressly acknowledged the "flexible

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2. The court of appeals' reliance on *Steel Co.* is misplaced for another reason. The complaint in *Steel Co.* was brought under the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA), 100 Stat. 1755, 42 U.S.C. § 11001-11050. This suit was brought under the Clean Water Act's citizen suit provision. Unlike the CWA, the EPCRA does not establish liability for discharges that exceed permit limitations like the Clean Water Act. Instead, it is a regulatory scheme that requires strict adherence to reporting functions. Violations under EPCRA are similar to CWA violations for failure to submit a discharge monitoring report -- violations of only one part of the scheme. The distinction between reporting requirements and permit violations is significant.' A regulated party often can substantially comply with reporting obligations simply by filing a late report. Indeed, that is how the defendant avoided the citizen suit in *Steel Co.* 523 U.S. 83 at 1009. By contrast, neither logic nor law supports the premise that a regulated party that made an illegal discharge can avoid liability by improving the quality of the partially treated waste water that has left its treatment facilities.

character" of Article III mootness, *id.* at 400, which calls for sensitivity to "*practicalities* and *prudential considerations*" rather than a "strict formalistic view of Art. III jurisprudence." *Id.* at 404 (emphasis added). *See also Honig*, 484 U.S. at 331 (Rehnquist, C.J., concurring) ("The logical conclusion to be drawn from these cases, and from the historical development of the principle of mootness, is that while an unwillingness to decide moot cases may be connected to the case or controversy requirement of Art. III, it is an attenuated connection that may be overridden where there are strong reasons to override it.").

Relying on formalistic standing requirements is particularly inappropriate in this case, where the separation of powers concerns underlying some standing requirements are absent. This is not a suit against the government with some risk that the courts will be drawn into judicial resolution of "general grievances" "pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). It is a suit by one private party against another. Indeed, any separation of powers concerns cut the other way. The judicial branch should be sensitive to Congressional power to define not only "injuries and . . chains of causation that will give rise to a case or controversy where none existed before," *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring), but also to *statutory remedies* for those injuries and chains of causation. It is the continued viability of such a statutory remedy that is the very issue in this case.

II. PETITIONERS' REQUEST FOR CIVIL PENALTIES DID NOT BECOME MOOT SIMPLY BECAUSE THE COURT DENIED INJUNCTIVE RELIEF

Applying mootness rather than standing concepts in deciding this case, the proper inquiry is not whether civil penalties "redress" petitioners' injury. Instead the court must decide whether it was "impossible for the court to grant to petitioners 'any effectual relief whatever,'" *Church of Scientology*, 506 U.S. at 12, *quoting Mills v. Green*, 159 U.S. 651, 653 (1895), once respondent ceased its violations and injunctive relief was no longer in issue. A case in which the relief sought is limited to civil penalties is not moot under this standard for at least two reasons.

First, monetary and damage claims are not usually moot even if injunctive relief becomes unavailable. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 498 (1969). That conclusion is unchanged by the ruling in *Gwaltney* that the citizen suit provision has a "prospective orientation." 484 U.S. at 59. The *Gwaltney* ruling is, as the Court indicated in *Steel Co.*, more properly understood as a ruling on the scope of the "cause of action" created under the CWA for citizens. *See Steel Co.*, 523 U.S. 83 at 1010-1011.

The "cause of action" concept is distinguishable from "standing" and "relief." *See Davis v. Passman*, 442 U.S. 228, 239-240 n.18 (1979).[3] "A plaintiff may have a *cause of action* even though he be entitled to *no relief*, as, for example

3. "Standing" refers to "whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy". *Davis v. Passman*, 442 U.S. at 239-240, n. 18. A "cause of action" defines the particular "class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240, n. 8. "Relief" is simply "a question of the various remedies a federal court may make available." *Id.*

when a plaintiff sues for declaratory or injunctive relief although his case does not fill the 'preconditions' for such equitable remedies." *Id.* at 240 n. 8. Similarly, injunctive relief may be denied even though an action might not be moot. *See United States v. W.T. Grant Co.*, 345 U.S. at 635-636.

Here, there is no question that petitioners' complaint alleged a valid cause of action under *Gwaltney*, *i.e.*, that petitioners alleged continuing rather than wholly past violations of the CWA. Petitioners' complaint sought declaratory and injunctive relief and civil penalties. The subsequent unavailability of one of those remedies -- injunctive relief -- cannot change the fact that petitioners stated in their complaint a viable "cause of action" that was fully in accord with *Gwaltney*, and that civil penalties remain a viable remedy under that cause of action.

Moreover, weighty practical considerations militate against the mootness of civil penalties in these circumstances. The rule adopted by the court of appeals permits defendants to wait until trial or appeal before complying with the CWA. The rule then allows them to completely escape civil penalties because of the belated elimination of "redressability." If that is true, then (a) no defendant has any incentive to comply with the CWA until the very last stages of litigation, and (b) citizens will be unlikely to even seek civil penalties because defendants can always escape penalties at the last minute. The practical effect of such a mootness rule would be to largely eliminate citizen suits for civil penalties. Congress, however, expressly authorized citizens to seek civil penalties. *See* 33 U.S.C. § 1365(a) ("district courts shall have jurisdiction . . . to apply any appropriate civil penalties under § 1319(d)"); S.Rep. No. 414, 92nd Cong., 2nd Sess. 1972, *reprinted in* 1972 U.S.C.C.A.N. 3745 (courts may "impose civil penalties . . . as a result of actions brought by citizens"). Because

practical considerations rightfully play a role in mootness doctrine, *see Honig v. Doe*, 484 U.S. at 330 (Rehnquist, C.J., concurring) (noting the "obvious pragmatic considerations" underlying the mootness exception for disputes "capable of repetition yet evading review"), the practical impact of the court of appeals' mootness rule strongly counsels against its adoption.

III. PETITIONERS' COGNIZABLE INJURY IS REDRESSED BY CIVIL PENALTIES

The court of appeals concluded that civil penalties will not redress petitioners' injury because the penalties go to the United States Treasury, not to petitioners, and therefore, the penalties do not "benefit" petitioners. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 149 F.3d 303, 306-07 (4th Cir. 1998). The court failed to appreciate the deterrent effect of civil penalties and the resulting benefits to the environment, environmental protection, and citizen suitors.

1. Civil penalties play a vital role in protecting the Nation's waters. Basically, penalties give defendants an incentive to cure violations and prevent further pollution. They also deter future violations.

Most importantly, the CWA specifically provides that the amount of penalties will be based, in part, on "the economic benefit (if any) resulting from the violation." 33 U.S.C. § 1319(d). Accordingly, penalties offset the economic benefits that a defendant might obtain by continuing its CWA violations after a plaintiff has filed a citizen suit. Civil penalties also are mandatory: violators "*shall* be subject to" civil penalties. 33 U.S.C. § 1319(d) (emphasis added). Penalties are certain, and by disgorging any resulting economic benefit, penalties are more than a cost of doing

business.. *See United States v. Municipal Auth. of Union Township*, 150 F.3d 259, 264 (3d Cir. 1998) (economic benefit analysis is used "to level the economic playing field and prevent violators from gaining an unfair competitive advantage.")

Mandatory civil penalties also work hand-in-hand with the 60 day notice provision of the CWA. The notice requirement gives violators a 60 day window of opportunity to remedy their violations free of any economic sanctions. An enlightened violator will take advantage of this opportunity. The affected waters will benefit, and so will the plaintiffs, who have a special interest in those waters. Unenlightened violators will learn their lesson the hard way; after a citizen suit has been filed, mandatory civil penalties will deprive those violators of any economic benefits from further noncompliance. Those penalties also specifically deter future violations of the CWA by the named defendant. Thus, civil penalties play a powerful remedial role both in stopping *ongoing* violations as soon as possible, and in deterring *future* ones by the defendant.

2. Contrary to the court of appeals' conclusion, civil penalties would benefit petitioners and redress their injury consistent with the "prospective orientation," *Gwaltney*, 484 U.S. at 59, of citizen suits. Petitioners' injury stems from ongoing violations of NPDES discharge permits. Civil penalties help stop those ongoing violations as soon as possible. An injunction may stop the violation, but standing alone it creates no real incentive for speedy compliance. The prospect of paying substantial civil penalties, on the other hand, can change a polluter's offending behavior.

Citizens filing CWA suits, whether the petitioners here or the Amici States elsewhere, are not indifferent as to the timing of compliance. They have a direct and powerful

interest, as users of the polluted waterway, in stopping violations as soon as possible. They are adversely affected by delays in compliance. The incentive for prompt compliance created by the threat of civil penalties defies the notion that civil penalties merely serve to redress wholly past, or speculative future injury. Civil penalties play a crucial role in halting ongoing violations as soon as possible -- a role that directly "benefits" plaintiffs, remedies their injury, and is fully consistent with *Gwaltney's* prospective focus.[4]

3. The court of appeals' rationale defeats all citizen suit claims for civil penalties, not just those where the district court has denied injunctive relief. Penalties always go to the Treasury. Citizens' suits would be brought to an abrupt end, no matter how egregious the circumstances, by a holding that the failure of Congress to direct civil penalties to the plaintiff's bank account is a sufficient basis to defeat a citizen suit. Congress clearly envisioned a different result: it provided for civil penalties *and* injunctive relief in citizen suits, not merely injunctive relief. 33 U.S.C § 1365. The court of appeals read the citizen suit provision as though Congress never even mentioned civil penalties.

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4. To say that civil penalties only redress *past* violations misunderstands the nature and dynamics of deterrence. Deterrence is based on credible threats. A threat of punishment made in an effort to change someone's behavior is only credible if the punishment is carried out later if the behavior does not change. In this case, if civil penalties cannot be imposed for respondent's "past," *i.e.*, post-complaint, violations, then civil penalties can never be a credible threat and will not have a coercive effect on polluter's behavior and ongoing post-complaint violations. In short, imposition of civil penalties for past violations is essential to, and inextricably linked with, deterring the continuation of earlier violations. In short, civil penalties deter, and deterrence enhances environmental protection. This in turn benefits a citizen suitor because that person has a special interest in the affected waters.

This approach is tantamount to saying that some form of "bounty" or *qui tam* provision is a constitutional prerequisite for Congress to authorize citizens to collect civil penalties for the government. Yet long ago the Court upheld a state statute authorizing private parties to sue for penalties that went exclusively to a local government, and the Court expressed no concern about any standing defects in such a statutory scheme. *See Lake Shore & Michigan Southern Railway Co. v. Ohio*, 173 U.S. 285, 286 (1899).

Certainly, under this statutory scheme, the federal government does not have to prove injury to its own interests in order to collect CWA civil penalties; nor must it use such penalties to remediate the polluted waterway. It follows that civil penalties do not have any *compensation* or *remediation* purpose; their sole purpose is deterrence. Where the money goes -- be it to the Treasury or elsewhere -- is irrelevant. So long as the violator pays the penalty, the deterrence purpose is achieved. The court of appeals' focus on where the money goes in analyzing the "benefit" to petitioners misperceived and underestimated the deterrent value of penalties.

4. These petitioners are interested in an award of civil penalties even though it goes to the Treasury because they personally benefit from the deterrent effects of the penalties. Their special interest in the affected waters makes their interest in the penalties more than a "generalized" one. And this interest, despite its complexity, is very real.

The court of appeals declared that civil penalties would merely provide petitioners "psychic satisfaction" in seeing the laws enforced and wrongdoers punished, and that the case, consequently, fell into the category of "generalized grievances" where standing is lacking. *Friends*, 149 F.3d at 306, *quoting Steel Co.*, 118 S.Ct. at 1019. Regardless of whether that might be true elsewhere, it is not true here.

This Court has explained that "generalized grievance" cases are those where

> the harm at issue is *not only widely shared*, but is also of an *abstract* and *indefinite* nature -- for example, harm to the 'common concern for obedience to law' [citations omitted]. The abstract nature of the harm -- for example, injury to the interest in seeing that the law is obeyed -- deprives the case of . . . concrete specificity . . . [and] prevents a plaintiff from obtaining what would, in effect, amount to an advisory opinion.

Federal Election Commission v. Akins, 118 S.Ct. 1777, 1785-1786 (1998) (emphasis added). Here, petitioners are not pursuing an abstract and indefinite injury like general obedience to the law. They have suffered special injury to their use of a particular waterway, something that distinguishes them from the general public. Neither of the two characteristics of a "generalized grievance," namely, "widely shared" and "abstract and indefinite" injury, are present in this case. Perhaps other members of the public may benefit indirectly from imposition of penalties against this defendant by virtue of an *in terrorum* effect against other future violators. But that does not undermine petitioners' standing. "[T]he general public interest" can always buttress one's standing. *Warth v. Seldin*, 422 U.S. at 501.

Furthermore, this case is not like cases where standing was lacking because redressability depended on the intervening response or actions of third parties, such as *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). Here, the penalties act directly and immediately on respondent -- the very party whose behavior is causing the injury to petitioners. Moreover, the Court has upheld indirect patterns of redressability even when redressability depended on the actions of a third party. *See Franklin v. Massachusetts*, 505

U.S. 788, 801-803 (1992) (redressability where declaratory relief action against Secretary was likely to result in compliance by the President); *Bennett v. Spear*, 520 U.S. 154, 168-170 (1997) (redressability in suit challenging biological opinion by U.S. Fish and Wildlife Service even though Bureau of Reclamation was not technically bound by the biological opinion, and the actions causing injury were those of the Bureau); *cf. Akins*, 118 S.Ct. at 1786-1787 (redressability in overturning discretionary prosecutorial decision even though agency might make the same decision not to prosecute later on different grounds). If "indirect" forms of redressability were sufficient in these cases, then *a fortiori*, the linkage between civil penalties and deterrence of ongoing violations establishes sufficient redressability for standing in this case.

CONCLUSION

Subsequent events neither destroyed petitioners' standing nor mooted their claim for civil penalties. Accordingly, this court should reverse and remand with instructions to decide the petitioners' appeal on the merits.

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Respectfully submitted,

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